DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Rapid City Indian Health Board, Inc. v. Director, Aberdeen Area Office,
Indian Health Service

Docket No. IBIA 97-100-A (08/29/1997)

Related Indian Self-Determination Act case:
Administrative Law Judge decision, 12/09/1998

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
COURT INTERNATIONAL BUILDING
2550 UNIVERSITY AVENUE WEST, SUITE 416N
ST. PAUL, MINNESOTA 55114-1052

In the case of:	)	
	)	
RAPID CITY INDIAN HEALTH BOARD, INC.,	)	
Appellant,	)	Date: August 29, 1997
	)	
v.	)	Docket No. IBIA 97-100-A
	)	Judge Vernon J. Rausch
DIRECTOR, ABERDEEN AREA OFFICE, INDIAN HEALTH SERVICE,	)	
Appellee.	)	
	)	

RECOMMENDED DECISION

This case is before me on a request for a hearing filed by the Appellant, the Rapid City Indian Health Board (RCIHB) challenging the refusal by the Appellee, the Director, Aberdeen Area Office, Indian Health Service (Area Director) to renew Contract No. 241-95-0010 (the Contract), a self-determination contract entered into between the Indian Health Service and the RCIHB, effective October 1, 1994 (FY 95) under Title I of the Indian Self-Determination and Education Assistance Act (ISDEA). See Joint Stipulation of Facts, No. 14.

The parties have entered into a Joint Stipulation of Facts (Stipulation) which is hereby incorporated by reference and the factual statements contained therein are adopted as findings of fact.

The contract was renewed or extended for the succeeding fiscal years, 1996 and 1997. Shortly after approving the contract for Fiscal Year 1997, the Area Director notified the RCIHB by letter, dated January 13,1997, that he would not approve renewal of the contract for FY 1998. Relying on a recommendation of the Headquarters Leadership Team, the Area Director alleged that the programs included in the Contract are not contractible under the ISDEA. Further elaboration of these grounds was furnished in a letter from the Area Contracting Officer to RCIHB on March 5, 1997. On

March 10, 1997 the RCIHB filed a notice of appeal with the Interior Board of Indian Appeals (IBIA) under the ISDEA and 25 C.F.R. Part 900, Subpart L.

The IBIA determined that the IHS' letters of January 13, 1997 and March 5, 1997 constituted an advance declination decision and that RCIHB was entitled to a hearing under 25 C.F.R. § 900.150(a). By letter also dated April 2, 1997 the Area Director informed RCIHB that the high risk OB-GYN program included in the Contract is contractible under the ISDEA. On April 4, 1997, the RCIHB submitted an application to renew the Contract making no change in the scope of work or funding. The parties have stipulated that IHS' actions prior to April 4, 1997 had the effect of denying the renewal request, that no further action is necessary on the renewal request and that this appeal will decide whether the declination of the renewal request was proper. RCIHB requested oral argument and waived the right to an evidentiary hearing following agreement on the Joint Stipulation of Facts. Stipulation Nos. 24, 25, 26, 28; Transcript 4.

The Appellant filed a motion for summary judgment on June 6, 1997, arguing that the Contract is a valid contact and must be renewed unless the IHS meets its burden of establishing valid grounds for refusing to renew the contract. Following the submission of initial briefs and reply briefs by the parties, oral argument was held in St. Paul, Minnesota, on July 15, 1997. I have carefully considered the evidence in the record, the parties' arguments and the applicable law. I conclude that the Area Director has not carried the burden of proof and has failed to demonstrate clearly, the validity of the grounds for denying renewal of this contract. The evidence in the record and the arguments of the parties do not clearly demonstrate that the programs which are the subject of this appeal are beyond the scope of programs, functions, services or activities specified in section 102(a)(1) of the ISDEA as contractible under that Act. The evidence does not establish that the proposal includes activities that cannot be lawfully carried out by the RCIHB under the Contract nor has the IHS presented controlling legal authority to support declination on that ground. 25 U.S.C. § 450f(a) and (e).

I have further concluded that since Contract No. 241-95-0010 is within the scope of the authority of the Indian Health Service, and RCIHB has not requested any material or substantial change in the scope or funding of the programs, functions, services or activities included in the Contract, the Area Director is prohibited by the Joint Regulations of the Secretary of the Interior and the Secretary of Health and Human Services from reviewing the renewal of the Contract for declination issues. 25 C.F.R. § 900.33 (1997).

Therefore, for the reasons more fully stated below, I recommend that the Area Director's decision be reversed and the Contract be renewed for FY 1998.

CONCLUSIONS OF LAW

The parties have stipulated that the issue in this appeal is the following:

> Does Contract No. 241-95-0010, as extended and modified, include programs, functions, services and activities that were and are not legally contractible under the Indian Self-Determination and Education Assistance Act, as amended, so that, to the extent that it includes such programs, the Contract is not a valid, binding and enforceable obligation of the United States, and the Contractor is not entitled to renew the Contract for FY 1998 and future contract years in accordance with the provisions of applicable federal regulations (25 C.F.R. Part 900, Subpart E).

For the following reasons I have concluded that the answer to this question is "No", that the Contract is a valid, legal, and binding obligation of the United States, and that it must be renewed in accordance with 25 C.F.R. § 900.33 (1997).

1. In the context of a declination hearing held pursuant to 25 C.F.R. § 900.150(a), the burden of proof is on the Indian Health Service ("IHS") to "establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof)." 25 U.S.C. § 450f(e)(1).

2. The instant dispute is over who will administer the programs under the Contract entered into pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEA"), codified at 25 U.S.C. § 450, et seq., the IHS, or the Rapid City Indian Health Board ("RCIHB"), a tribal organization representing the Indian residents of Rapid City and duly sanctioned by three federally-recognized tribes whose members make up nearly 80% of the RCIHB's active patient population. The dispute is not one between the Indian residents of Rapid City and the three sanctioning tribes, nor is there a dispute among the tribes themselves. This is not a case in which Indians are on both sides of the dispute and consequently there is no basis in this record for refusing to apply the principle of liberal statutory construction in favor of Indians.

3. The ISDEA directs the Secretary of Health and Human Services to contract at the request of an Indian tribe (or tribes) to plan, conduct, and administer programs for the benefit of Indians which are authorized under a series of statutes identified in the ISDEA. Generally, the programs identified in the statute as being "for the benefit of Indians" are contractible under the Act. 25 U.S.C. § 450f(a)(1).

4. Congress' declared intention with the implementation and amendment of the ISDEA has been to maintain the government's unique and continuing trust responsibility to Indian tribes and Indian people by implementing a meaningful self-determination policy that allows them to have effective and meaningful participation in the planning, conducting, and administration of federal programs for their benefit, thereby ending years of federal governmental domination over those programs which has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities. 25 U.S.C. § 450a(a) and (b).

5. The series of statutes whose programs are authorized for contracting under the ISDEA include the Snyder Act, 25 U.S.C. § 13, (which authorizes the Bureau of Indian Affairs' ("BIA's") expenditure of appropriations "for the benefit, care, and assistance of Indians throughout the United States" including "the relief of distress and the conservation of health") and the Transfer Act, 42 U.S.C. § 2001, et seq., (which transferred the operation and maintenance of hospitals and health facilities from the Department of the Interior to the Department of Health and Human Services, wherein the Indian Health Service ("IHS") administers the Indian Health Care Improvement Act, 25 U.S.C. § 1601, et seq).

6. The programs administered pursuant to Contract No. 241-95-0010 at issue in this dispute are authorized and provided for by the Snyder Act or the Transfer Act or both, and are, therefore, within the scope of programs authorized to be conducted by a tribe or tribal organization pursuant to the ISDEA

7. The definition of "tribal organization" in the ISDEA includes a proviso that "in any case where a contract is let or grant made to an organization to perform services benefiting (sic) more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." 25 U.S.C. § 450b(l). There is no dispute that each of the three "tribes" [1] involved in this contract has given its approval.

8. In agreements with the RCIHB pursuant to the ISDEA since 1990, the IHS appears to have held to a consistent view that the sanctioning “tribes” of the RCIHB “benefitted” [2] from various Rapid City programs for purposes of the ISDEA, and were,

---

[1] The three tribes (and three reservation land bases) were in fact, created by the government's deliberate act of dividing the Sioux Nation.

[2] The IHS' construction of the word *benefiting* as used in 25 U.S.C. §450b(l) is particularly strained and is not warranted by the act or its purpose. The act expressly recognizes

therefore, entitled to contract to administer them pursuant to the ISDEA, although no sanctioning tribe has currently [3] had a land base within the Rapid City Service Unit.

9. The IHS' new and revised interpretation, announced to the RCIHB on January 13, 1997 - that the contract at issue is invalid because the programs thereunder are not contractible under the ISDEA due to the sanctioning tribes' lack of a tribal land base within the Rapid City Service Unit and because of the legislative history of some funding provided in 1967 for "indigent Indians in Rapid City" - is directly contrary to its previous consistently held agency view and is, therefore, entitled to considerably less deference than would be the case if the position had been consistently held in the interpretation of the ISDEA. Good Samaritan Hospital v. Shalala, 508 U.S. 402, 417 (1993) (agency interpretation of a statutory provision which conflicts with its earlier interpretation is entitled to "considerably less deference").

10. I reject the IHS' assertion that the Contract was entered into upon a mistaken legal interpretation which the IHS has a right to correct by terminating the Contract because, as discussed below, none of the arguments put forth by the IHS support its position.

10.a. The IHS relies on Kickapoo Tribe of Oklahoma v. Indian Health Service, Decision of the Director of Indian Health Service (May 22, 1992), to support its argument that the ISDEA prohibits the contracting of programs to a tribal organization

---

that a contract may *benefit* more than one tribe and requires approval of the benefitting tribes, but in doing so, the act necessarily implies that in cases of multiple tribal beneficiaries, one or more of them may not have a land base in the service area. Surely a tribe *benefits* whenever its members receive health care services, whether on or off the tribal land base.

[3] The Contract is performed in an area near and (in one case) adjacent to the reservations of the three tribes. Members of these tribes form the overwhelming majority of the service population. Most significantly, the services are performed within Pennington County which, as stipulated by the parties, lies within the former Great Sioux Reservation established by the Treaty of April 29, 1868, for the benefit of the Sioux Nation, the predecessor in interest of these three tribes. In such circumstances, the argument of IHS that this is a situation in which Indians left the reservation to migrate to an urban center and that Congress created a distinct program for "urban Indians" in Rapid City, is not persuasive and is certainly not supported by the stipulated record. The current service population may just as well be the descendants of Sioux originally located in this area who have continued to live there since the United States took the present Pennington County from the Sioux. They may also have moved back and forth between Pennington County and the adjacent and nearby Sioux reservations several times in the past century. See United States v. Sioux Nation of Indians, 448 U.S. 371, 409 n. 26 (1980).

whose sanctioning tribes do not maintain a land base within the geographic area to be served. Kickapoo does not support this argument. Kickapoo involved the question of which of **two competing tribes**, the Oklahoma Kickapoo or the Texas Kickapoo, were entitled to provide contract health care under an ISDEA contract to members of the Oklahoma Kickapoo, residing in a contract health service delivery area established for and in which the Texas Kickapoo Tribe resided, but located some 600 miles from the Oklahoma Kickapoo land base. IHS ruled that the Texas Kickapoo tribe, not the Oklahoma Kickapoo tribe, was the tribe benefitting from the contract and, therefore, declined the Oklahoma Kickapoo's contract application. Appellee's Opening Brief, Ex. B, 6-11, 17. The instant dispute does not involve tribes competing against one another to contract under the ISDEA, nor does it involve the creation of a service area specifically to benefit one tribe and not the other. Finally, the lack of a tribal land base by the Oklahoma Kickapoo in the geographic area to be served was an important factor in Kickapoo only because the competing tribe did maintain a land base therein. Accordingly, Kickapoo has little bearing on the instant dispute. The only true relation between Kickapoo and the present case is the situation that existed prior to the organization of the Texas Kickapoo as a federally-recognized tribe. The Texas service area contained Indians then recognized as members of a subordinate band of the Oklahoma Kickapoo but no tribal land base existed therein. The IHS contracted with the Oklahoma Kickapoo under the ISDEA to provide contract health care to these Indians although they were located in a different state and over 600 miles distant from the Oklahoma Kickapoo tribal land base. While the decision in the case did not address this pre-existing situation, it clearly supports the Appellant's argument that the IHS has not consistently refused to contract for health services to Indians located in a service area in which the requesting tribe(s) has no land base. See Appellee's Opening Brief, Ex. B, 2, 12. [4]

10.b. IHS also relies on Shingle Springs Rancheria v. Indian Health Service, Dkt. No. C-93-020 (HHS Dept. Appeals Board, 1994). This case involved a dispute **between two tribes** as to which tribe was entitled to exercise ISDEA rights with respect to a specific geographic service area. One of the tribes (Shingle Springs) was located within the pre-existing IHS service area, and the other tribe was located outside the service area. Appellant's Response Ex. F, 9, 10, 22. The decision in Shingle Springs does not hold that the outside tribe does not benefit from the program merely because it has no land base in the service area (a point which would appear to be required to support the position taken by IHS in this case). Instead, IHS determined that the service area should be divided between the two competing tribes in order to accommodate the ISDEA rights of each tribe. Appellant's Response Ex. F.

---

[4] See note 2, supra. The statute clearly does not require that the contract service area include any part of the tribal land base.

Furthermore, an IHS witness at the evidentiary hearing in that case testified that service unit or service area boundaries were irrelevant to tribal ISDEA contracting rights, and the decision so found. Appellant's Response, Ex. C, 202; Appellant's Response 28. The decision in Shingle Springs does not support the IHS position that it has had a consistent policy of interpreting the ISDEA to deny contracting rights to tribes with a land base located outside the service unit in which the ISDEA contract is to be performed. Instead, the result in the case is that, an "outside" tribe benefitting from a program may exercise its ISDEA rights as to its members located in the service area and that, in case of competition for a contract between an inside tribe and an outside tribe, the IHS may re-draw service area boundaries to accommodate contracts with both tribes.

10.c. The regulatory provision of 25 C.F.R. § 900.8(d)(1) governs the authorizing resolutions required to support an initial contract proposal. It clearly refers to the geographic area which a tribal organization proposes to serve, not a service unit or service area previously established by the IHS. The purpose of this regulation is obviously to ensure that tribes or tribal organizations otherwise eligible to contract to conduct the programs within the area proposed to be served have acquiesced in the administration of those programs by the proposing tribe. Nothing therein prohibits the contracting of programs in the Rapid City Service Unit to the RCIHB which is sanctioned by the three tribes in closest proximity thereto and whose members make up 80% of the active patient population of the programs under the Contract.

10.d. IHS' reliance on the lump sum appropriation within the Interior and Related Agencies Appropriations Act of 1967, Public Law No. 89-435, 80 Stat. 170, and its legislative history concerning "the operation of a health clinic in Rapid City, South Dakota, to care for indigent Indians in that City", S. Rep. No. 1154, 89th Cong., 2nd Sess. 30 (1966), is misplaced. Neither establish any clear intent on the part of Congress to create and maintain the Rapid City services as a separate and distinct program of the IHS through perpetuity, insulated from the tribal self-determination legislation subsequently enacted.

10.e. The activities funded under the Contract were not established or continued under Title V of the Indian Health Care Improvement Act governing the provision of certain health services to urban Indians, and are not funded as such; accordingly, I reject the IHS' assertion that these programs are beyond the scope of the ISDEA merely because of what IHS terms the "urban" character of Rapid City.

10.f. This case presents a very unique situation, involving three tribes, originally one nation, not competing with one another, but joined in an effort to serve their respective members living in a service area that was originally reservation land, but

which has since been taken by the government and has since become an urban residential and commercial center for Indians and non-Indians.

11. The IHS must comply with its own regulations and failure to do so is arbitrary conduct on the IHS' part that is not permissible. See Morton v. Ruiz, 415 U.S. 199, 235 (1974) (the BIA must "comply ... with its own internal procedures" even where those procedures are more rigorous than required); accord Service v. Dulles, 354 U.S. 363, 388 (1957); Vitarelli v. Seaton, 359 U.S. 535, 539-540 (1959); see also, Orengo Caraballo v. Reich, 11 F.3d 186, 193 (D.C. Cir. 1993)("the agency may not violate its own regulations."); Neal v. Secretary of the Navy, 639 F.2d 1029, 1035 (3d Cir. 1981)("an agency is bound to follow those [regulations] which it has adopted.").

12. 25 C.F.R. § 900.33 provides that the IHS "will not" review the request for renewal of a term contract for declination issues (25 U.S.C. § 450f(a)(2)) where no material and substantial change in the scope or funding has been proposed by the contractor.

13. This regulation was promulgated pursuant to the negotiated rule-making process required by the ISDEA (25 U.S.C. § 450k(d)) and its use of the phrase “will not” connotes a mandatory, non-discretionary duty on the part of the IHS not to subject renewal requests to the declination criteria. See Black’s Law Dictionary 1598 (6th ed. 1990) (“will” is an “auxiliary verb commonly having the mandatory sense of ‘shall’ or ‘must’”, rather than the discretionary “may”); City of Edmunds v. United States, 749 F.2d 1419, 1421 (9th Cir. 1984) (citation omitted) (“shall” denotes a mandatory intent absent a convincing argument to the contrary); Reeves v. Andrus, 465 F.Supp. 1065, 1069 (D. Alaska 1979) (“shall” is presumed to be mandatory); Pennsylvania v. Weinburger, 367 F.Supp. 1378 (D.D.C. 1973) (“shall” is mandatory in nature, depriving the official of discretion, and making the commanded act a ministerial duty).

14. The RCIHB proposed no changes in its request for renewal that would have authorized the IHS to reconsider it as an initial proposal under the ISDEA declination criteria. The IHS' determination that the programs under the Contract are not contractible under the ISDEA, however, is the equivalent of a declination under 25 U.S.C. § 450f(a)(2)(E) which authorizes the declination of an ISDEA contract proposal if the program sought to be contracted cannot lawfully be carried out by the contractor.

15. The IHS' decision to terminate the Contract, is not simply the correction of a mistaken legal interpretation or the correction of an *ultra vires* act of the approving official, but rather involves the application of the declination criteria to the renewal request for a term contract, and thus, violates the IHS' own regulations governing contract renewal.

16. The IHS, having failed to demonstrate clearly the validity of any of the grounds relied upon for declining to renew the RCIHB's Contract, has not met its burden of proof in this declination hearing and, accordingly, the RCIHB is entitled to immediate renewal of the Contract pursuant to 25 C.F.R. § 900.33.

CONCLUSION

Based on the foregoing, I conclude that the Appellee's proposed declination of the RCIHB request to renew Contract No. 241-95-0010 is not supported by the provisions of the ISDEA. The Contract is a valid, binding and enforceable obligation of the United States, and under applicable federal law and regulations, particularly 25 C.F.R. § 900.33, the Contract is renewable as requested by RCIHB without review for declination issues.

//original signed
Vernon J. Rausch
Administrative Law Judge